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IN THE

SUPREME COURT OF THE UNITED STATES

* * * * * * * * *

NO. 79-6782

* * * * * * * * *

GERALD RICHARD JOHNS, ET AL

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

* * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

* * * * * * * * * * * * * * * *

IN FORMA PAUPERIS

GEORGE ALLEN PARKER
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ATTORNEY FOR PETITIONER

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Petitioner, GERALD RICHARD JOHNS, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered April 17, 1980, affirming his conviction of 18 U.S.C.A. 245 (b)(5) as charged in the indictment, and that on hearing the judgment of conviction be reversed.

OPINION

The opinion of the United States Court of Appeals, Fifth Circuit, has been reported as No. 79-5336 - USA V. GERALD RICHARD JOHNS, ET AL.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 17, 1980. A Stay of Mandate pending possible review by this Court was granted until May 17, 1980. Your petitioner is incarcerated in the Talladega County jail, Talladega, Alabama, where he is serving a three year state sentence.

GEORGE ALLEN PARKER, Attorney for Petitioner, (appointed by the 5th. Circuit Court of Appeals on June 26, 1979) wrote to petitioner on April 22, 1980, advising him of his right to seek further review by the filing of a writ of certiorari with the United States Supreme Court and of the time factor involved. Your petitioner wrote to his attorney, George Allen Parker, on May 20, 1980, and requested that a writ of certiorari be filed for him. It is felt that your petitioner did not act sooner because of excuseable neglect, and therefore, should be allowed to file this writ of certiorari.

This Court has jurisdiction under 28 U.S.C., Para. 1254 (1).

A Petition For a Writ of Certiorari is now pending for the other defendants, HOWARD SEAVEY WELD, ET AL, who were all convicted along with Petitioner, GERALD RICHARD JOHNS.

QUESTIONS PRESENTED

1. Whether the petitioner was denied the most basic right to a trial by fair and impartial jury when an unauthorized prejudicial conversation between a sequestered juror and a third person concerning an inflammatory, untrue but brutally hurtful newspaper article was proved to have occurred and been relayed to the foreman of the defendent's jury and a conviction thereafter countenanced, even though the trial court knew of the occurrence prior to the jury's verdict.
2. Whether the proscriptions of Title 18 U.S.C.A. 245 (b)(5) were unconstitutionally applied to the petitioner under the facts in the record and thereby badly misconstrued by the Fifth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The petitioner, alleged member of the Ku Klux Klan, was convicted in the United States District Court for the Northern District of Alabama of violating certain provisions of the 1968 Civil Rights Act(specified infra) by shooting into both occupied and unoccupied dwellings in the Sylacauga - Talladega area of Alabama and sentenced to serve two years in Federal custody as a result thereof.

The appellant's Klan chapter was concerned with the dating, social and living habits of bi-racial couples in Sylacauga, Alabama. On November 30, a committe made up of the petitioner, GERALD RICHARD JOHNS, and other defendants, met and formulated a plan to intimidate Willie James Williams and Charles Woods, respectively, presidents of the Sylacauga and Childersburg chapters of the NAACP.

According to their plan, the men divided into two teams. One team went to Woods' residence in Childersburg. Smith and Riley waited for the shotgun while Holmes and Massey acted as backup. Burchell drove Ward, who fired five shots into the home. The second team proceeded to Williams' home. Bettis drove Charles Stewart and Maness, both armed with shotguns. The Petitioner, Johns and Joseph Stewart rode in another car. Maness fired four shots, striking both the home and Williams' automobile.

Following the incidents, the appellants were indicted. After a jury trial, Bettis, Burchell, Smith, Massey, Charles and Joseph Stewart, Johns and Riley were convicted for intimidating and interfering with persons exercising a federally protected activity, 18 U.S.C. 245 (b)(5), and for conspiring to do the same, 18 U.S.C. 371, 245 (b)(5).

Appellant's mistrial argument rests on their assertion that prejudicial information had reached the sequestered jury. They argue that the district court committed reversible error in overruling their motions for mistrial following receipt of information that an alternate juror had learned that a witness had been killed.

On June 12, 1979, the trial Court informed all counsel that it had received a report from the U.S. Marshal that one of the alternate jurors had inquired about a witness' death. The two alternate jurors had been dismissed on the previous day when the jury began its deliberations. The district judge immediately held a full hearing to determine what the alternates knew and what, if anything, they had conveyed to other members of the jury. Alternate juror Hicks testified that his wife had said that a witness had been killed and that he mentioned this to alternate juror Rose and to jury foreman Davis. Rose's testimony confirmed that she had heard of the killing.

REASONS FOR GRANTING THE WRIT

The first reason for granting the writ is that the Fifth Circuit Court of Appeals for the United States, in deciding the trial court's actions proper in refusing a mistrial, either bottomed its decision in complete disregard for the actual facts contained in the trial record or inadvertently omitted any logical application thereof (United States V. Johns, 5th Circuit, April 17, 1980. The Fifth Circuit Court of Appeals did note that the trial court had received information that while the jury was deliberating, one of the alternate jurors, had "inquired" of a Marshal (subsequent to being dismissed) about a potential witness' death which his wife had read in the newspaper and that, most importantly he had mentioned same to the jury foreman, who was at the time deciding the case. What the Fifth Circuit did not say was that the hearing disclosed that the alternate and the foreman had discussed between themselves "possible repercussions, what might happen if this, you know if they were found guilty or not guilty, whatever might happen" (U.R. 1820).

It must be kept in mind that the trial involved the alleged activities of a Ku Klux Klan chapter, which is in itself highly controversial in Alabama, whether lawful or not. Moreover, a fair reading of the trial transcript discloses that the alternate and the foreman discussed the death of the potential witness as being attributed to the Klan "obviously" (T. 1828).

Furthermore, those facts came to the attention of the Court, while the jury was deliberating under the direction of the self-same foreman. Lastly, the information stemmed from a banner headline in the local paper that a witness had been killed and there was possible Klan involvement. At that time, not yet knowing that the jurors had found out about the erroneous article, the trial judge commented how fortunate it was that the jurors were sequestered and, consequently, could not be tainted by the prejudicial publicity. What the Fifty Circuit did was allow the jurors to tell the trial court that they were not prejudiced either by knowing (in the foreman's case) or in their deliberations (by the foreman's views we guess). The appeals court blithely noted that neither alternate juror could identify the witness with the prosecution or the defense but the record leaves no doubt that the killing was believed Klan related, understandably, the F.B.I. was not equally suspected.

As long ago as 1892 this Court set out the law in Mattox V. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917. It said, without equivocation three things that the Fifth Circuit Court of Appeals has either left unattended or "changed":

> 1. Possibly prejudicial private communications between jurors are absolutely forbidden, and invalidate the verdict at least until their harmlessness is made to appear.
> 2. Evidence of jurors as to the motives and influences which affected their deliberations is inadmissible either to support or impeach a verdict.
> 3. The trial judge must determine as a matter of law that the subject matter is clearly not prejudicial or else grant a new trial.

In the constitutional sense, trial by jury implies at the very least that all evidence against a defendant come from the witness stand if Justice Stewart was correct in Turner V. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed. 2d. 424 (1965).

This court has always, without swerving, protected this principle, see Parker V. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed. 2d. 420 (1966). The Circuit Courts know that judicial questioning was no way to "eliminate" prejudice, O'Shea V. United States, 400 F.2d. 78 (1968).

To summarize, the importance and scope of this question was and still is vital and nationwide. Publicity and its various methods of being purveyed are ever increasing and are present to some degree in practically all cases involving any real controversy. To permit this decision to stand without a look at the full record and a full hearing, should be nearly unthinkable. The constitutional wrong done is palpably horrendous, its scope immense, its after effects chillingly predictable in the Northern District of Alabama. Certiorari should be granted without doubt.

Secondly, not only does this case go to the root of all criminal cases, a fair jury, it also provides a vehicle to properly construe the correct application of two congressional acts, which, we submit, have been horribly distorted, viz., Title 42 S 3631 of the United States Code (Fair Housing Act), and Title 18, S 245(b)(5) of the United States Code (fair employment practices).

The defendants in the instant case were "proved"to be in two simultaneous, but isolated, acts of violence directed against the property of some black males and one unrelated, isolated violent act against two white females in the company of some other young black males. All of these acts, a fair reading of the record would disclose, were almost totally motivated by racial prejudices relating to some "precept" the defendants allegedly had about social contact between black men and white women. They were impromptu and totally unrelated to any specific intention to defect Congressional plans relative to fair housing practices and/or job discrimination. State prosecutions related to this general violence has been successfully maintained in some instances occasioning felony convictions and custody. But, it is crystal clear that the appellants did not know or care about the Federal laws charged, they were proved to have attempted to "punish" black males and white females who were or had fraternized together, either sexually or at public meetings. Application of the laws in question is so strained as to be nearly ludicrous but, if countenanced, Federal Courts will become state forums much more often than is needed or desirable for either and to prevent that is very important. The very fact that the Petitioner, Johns, is now serving state time for the same type of conduct is very note-worthy proper forum.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed, postage prepaid, this 28th day of May, 1980, to: Hon. Wade H. McCree, Jr.
Solicitor General United States
Department of Justice
Washington, D.C.

GEORGE ALLEN PARKER

No. 79-6782

UNITED STATES of America, Plaintiff-Appellee,

v.

Gerald Richard JOHNS, Howard Seavey Webb, Mahlon W. Burchell, Joseph Ralph Stewart, Charles Randall Stewart, Thomas Aaron Smith, Arthur Dee Riley, William Eugene Massey, James Henry Bettis and Will Roger Reynolds, Defendants-Appellants.

No. 79-5336
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 17, 1980.

Defendants were variously convicted in the United States District Court for the Northern District of Alabama, Frank H. McFadden, Chief Judge, of intimidating and interfering with persons exercising federally protected rights, of conspiring to interfere or intimidate exercise of such rights, of criminal violation of Fair Housing Act, and of conspiracy to violate the Act. The Court of Appeals held that: (1) shooting into residence to discourage both interracial living arrangements and interracial dating established that defendants intended, by their conduct, to interfere, in violation of statute, with exercise of rights of the attacked individuals and others to live where they wished regardless of their race or color; (2) where defendants, by attacking NAACP leaders, intended forcibly to discourage efforts by NAACP to secure better employment and housing opportunities for blacks and to discourage its efforts to insure appropriate distribution of government revenues to beneficiaries of various programs, defendants were shown to have violated provision of Civil Rights Act of 1968 proscribing intimidating and interfering with persons exercising federally protected rights; and (3) it was not abuse of discretion to overrule defendants' motions for mistrial made following receipt of information that alternate juror had learned that witness had been killed.

Affirmed.

1. Civil Rights ⇐11.5

Provision of Fair Housing Act proscribing wilfully injuring, intimidating or interfering, by force or threat of force, or attempting to injure, intimidate or interfere, with any person because of his race and because he is or has been occupying any dwelling protects one's right to occupy home regardless of race. Civil Rights Act of 1968, § 901, 42 U.S.C.A. § 3631.

2. Civil Rights ⇐15

Shooting into residence to discourage both interracial living arrangements and interracial dating established that defendants intended, by their conduct, to interfere, in violation of statute, with exercise of rights of the attacked individuals and others to live where they wished regardless of their race or color. Civil Rights Act of 1968, § 901, 42 U.S.C.A. § 3631.

3. Civil Rights ⇐15

Presence of other motive, given existence of defendants' motive to end interracial cohabitation, did not make their conduct of shooting into residence any

* Fed.R.App.P. 34(a); 5th Cir. R. 18.

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less a violation of Fair Housing Act. Civil Rights Act of 1968, § 901, 42 U.S. C.A. § 3631.

4. Civil Rights ⇐15

Where defendants, by attacking NAACP leaders, intended forcibly to discourage efforts by NAACP to secure better employment and housing opportunities for blacks and to discourage its efforts to insure appropriate distribution of government revenues to beneficiaries of various programs, defendants were shown to have violated provision of Civil Rights Act of 1968 proscribing intimidating and interfering with persons exercising federally protected rights. 18 U.S. C.A. § 245(b)(5).

5. Criminal Law ⇐855(8)

It was not abuse of discretion to overrule defendants' motions for mistrial made following receipt of information that alternate juror had learned that witness had been killed where neither the alternate juror nor jury foreman, to whom the alternate juror had mentioned such information, could identify the witness with prosecution or defense, both the alternate juror and the foreman testified that they had not been intimidated or affected by such information, and the foreman testified that he had not ascribed any significance to the information or linked the information to the trial.

6. Criminal Law ⇐868

In criminal proceedings in which defendants sought mistrial following receipt of information that alternate juror had learned that witness had been killed, procedure of trial court of separately questioning alternate jurors and, subsequently, the serving jurors, who had begun deliberations at time trial court received report that alternate juror had inquired about witness' death, was proper.

Appeals from the United States District Court for the Northern District of Alabama.

Before CHARLES CLARK, VANCE and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

Gerald Richard Johns, Howard Seavey Webb, Mahlon W. Burchell, Joseph Ralph Stewart, Charles Randall Stewart, Thomas Aaron Smith, Arthur Dee Riley, William Eugene Massey, James Henry Bettis and Will Roger Reynolds are members or associates of the Ku Klux Klan. They were indicted and convicted on various criminal charges stemming from their attempts to interfere with the civil rights of whites and blacks in Sylacauga and Childersburg, Alabama. Their appeal challenges both the district court decision overruling their motions for mistrial and the sufficiency of the evidence to support their convictions. We affirm.

I

The appellants' Klan chapter was concerned with the dating, social and living habits of bi-racial couples in Sylacauga, Alabama. On November 24, 1978, Randy Charles Ward, Joseph Stewart, Reynolds, Webb and Bettis were appointed to a committee on the matter. They met that evening and formulated a plan to shoot into the Huntley residence, a home occupied by two black men and two white women. Stewart gave Ward a shotgun. Leaving the Klan hall, these

men proceeded in three cars to the Huntley residence. Webb, armed with a rifle, drove with Reynolds, acting as a backup to fend off intruders or pursuers. Bettis parked two blocks away, waiting to receive the shotgun from Ward in order to conceal it. Ward, in a car driven by Stewart, fired into the front of the house.

On November 30, a second committee, consisting of Ward, Burchell, Charles and Joseph Stewart, Johns, Rickey Maness, Massey, Fred Holmes, Jr., Bettis, Smith and Riley, met and formulated a plan to intimidate Willie James Williams and Charles Woods, respectively, presidents of the Sylacauga and Childersburg chapters of the NAACP. The committee's goal was to curb NAACP efforts to instigate affirmative action programs for black employment within the Sylacauga and Childersburg city governments.

According to their plan, the men divided into two teams. One team went to Woods' residence in Childersburg. Smith and Riley waited for the shotgun while Holmes and Massey acted as backup. Burchell drove Ward, who fired five shots into the home. The second team proceeded to Williams' home. Bettis drove Charles Stewart and Maness, both armed with shotguns. Johns and Joseph Stewart rode in another car. Charles Stewart fired a single blast into Williams' home. Maness fired four shots, striking both the home and Williams' automobile.

Following these three incidents, the appellants were indicted. After a jury trial, Bettis, Burchell, Smith, Massey, Charles and Joseph Stewart, Johns and Riley were convicted for intimidating and interfering with persons exercising a federally protected activity, 18 U.S.C. §§ 2, 245(b)(5), and for conspiring to do the same, 18 U.S.C. §§ 371, 245(b)(5), (counts three through five). Webb, Reynolds and Joseph Stewart were also convicted of conspiring to violate the Fair Housing Act, 18 U.S.C. § 371, 42 U.S.C. § 3631, and, along with Bettis, for violating the same, 18 U.S.C. §§ 2 or 3, 42 U.S.C. § 3631, (counts six through eight).[1]

Sufficiency of the Evidence

Appellants challenge the sufficiency of the evidence to sustain their convictions under either 42 U.S.C. § 3631 (counts six, seven and eight) or 18 U.S.C. § 245(b)(5) (counts three, four and five). They assert that neither statute reaches, and criminally sanctions, the sort of activity in which they were engaged. They argue, further, that even if their activity was proscribed, they lacked the intent necessary to sustain a conviction under these statutes.

These arguments are without merit. Viewed in the light most favorable to the government and the jury verdict, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), the prosecution produced substantial evidence sufficient to sustain the convictions on counts three through eight. *See, e. g., United States v. Aguiar*, 610 F.2d 1296, 1305 (5th Cir. 1980); *United States v. Villareal*, 565 F.2d 932, 937–38 (5th Cir.), *cert. denied*, 439 U.S. 824, 99 S.Ct. 92, 58 L.Ed.2d 116 (1978).

The legislative history accompanying 42 U.S.C. § 3631 and 18 U.S.C. § 245(b)

1. The jury acquitted Bettis, Webb, Burchell, Charles Stewart, Joseph Stewart and Johns on conspiracy and substantive counts charging them with the unlawful impersonation of an FBI agent, 18 U.S.C. §§ 2, 371, 913. Burchell was also acquitted on count six, charging a conspiracy to violate the Fair Housing Act.

indicates a clear congressional intent to impose criminal sanctions on persons who engage in the conduct appellants were found to have participated in and with the intent appellants were found to have had. S.Rep. No. 721, 90th Cong., 2d Sess., *reprinted in* [1968] U.S.Code Cong. & Admin.News, pp. 1837, 1838-39, 1843, 1845.

[1-3] Title IX of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. § 3631, provides in pertinent part:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
>
> (a) any person because of his race . . . and because he is or has been . . . occupying . . . any dwelling . . .
>
> . . . . . .
>
> shall be fined not more than $1,000, or imprisoned not more than one year, or both . . . .

This provision protects one's right to occupy a home regardless of race. *Cf. United States v. Ellis*, 595 F.2d 154, 158 n. 3 (3rd Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 75, 62 L.Ed.2d 49 (1979) (section 3631 reaches firebombing of Spanish-surnamed family's home); *United States v. Anzalone*, 555 F.2d 317, 318 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015, 98 S.Ct. 732, 54 L.Ed.2d 760 (1978) (section 3631 reaches acts of vandalism and arson designed to intimidate blacks from moving into a neighborhood; conviction reversed on other grounds). The evidence supports the jury's finding that the defendants shot into the Huntley residence to discourage both interracial living arrangements and interracial dating. The presence of other motives, given the existence of the defendants' motive to end interracial cohabitation, does not make their conduct any less a violation of 42 U.S.C. § 3631. Under the circumstances of this case, the jury could well find that defendants intended by their conduct to interfere with the exercise of the rights of the attacked individuals and others to live where they wish regardless of their race or color.

[4] Title I of the Civil Rights Act of 1968, 18 U.S.C. § 245(b)(5), in pertinent part, provides:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
>
> . . . . . .
>
> (5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate [in such public assistance programs as seeking or enjoying employment, or partaking of benefits, services, privileges, programs, facilities or activities provided by the United States], without discrimination on account of race, color . . .
>
> shall be fined not more than $1,000, or imprisoned not more than one year, or both . . . .

The evidence adduced at trial demonstrates that in attacking the NAACP leaders the defendants intended forcibly to discourage the NAACP's efforts to secure better employment and housing opportunities for blacks and its efforts to ensure appropriate distribution of government revenues to the beneficiaries of various programs. *See, e. g., United States v. Griffin*, 525 F.2d 710, 712 (1st Cir. 1975), *cert. denied*, 424 U.S. 945, 96 S.Ct. 1414, 47 L.Ed.2d 351 (1976). Title 18 U.S.C. § 245(b)(5) clearly warrants

prosecuting individuals who attempt to interfere with such efforts. *See Johnson v. Mississippi*, 421 U.S. 213, 224-26, 95 S.Ct. 1591, 1597-1598 (1975); *Williams v. Tri-County Community Center*, 452 F.2d 221, 223 & n. 3 (5th Cir. 1971). *See also United States v. Price*, 464 F.2d 1217, 1218 (8th Cir.), *cert. denied*, 409 U.S. 1040, 93 S.Ct. 522, 34 L.Ed.2d 489 (1972); *Hill v. Pennsylvania*, 439 F.2d 1016, 1021-22 (3rd Cir.), *cert. denied*, 404 U.S. 985, 92 S.Ct. 445, 30 L.Ed.2d 370 (1971).

Motion for a Mistrial.

[5] Appellants' mistrial argument rests on their assertion that prejudicial information had reached the sequestered jury. They argue that the district court committed reversible error in overruling their motions for mistrial following receipt of information that an alternate juror had learned that a witness had been killed. The district court, after conducting a full hearing on the matter, properly exercised its discretion in overruling appellants' mistrial motion. *United States v. Khoury*, 539 F.2d 441, 443 (5th Cir. 1976), *cert. denied*, 429 U.S. 1040, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977); *Tillman v. United States*, 406 F.2d 930, 937 (5th Cir.), *vacated in part on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969).

On June 12, 1979, the trial court informed all counsel that it had received a report from the U. S. Marshal that one of the alternate jurors had inquired about a witness' death. The two alternate jurors had been dismissed on the previous day when the jury began its deliberations. The district judge immediately held a full hearing to determine what the alternates knew and what, if anything, they had conveyed to other members of the jury. Alternate juror Hicks testified that his wife had said that a witness had been killed and that he mentioned this to alternate juror Rose and to jury foreman Davis. Rose's testimony confirmed that she had heard of the killing. Neither juror could identify the witness with the prosecution or the defense. Both testified that they had not been intimidated or affected by the information. At the conclusion of the hearing, each defendant moved for a mistrial. The court overruled these motions and entered findings concerning the absence of prejudice.

On June 14, 1979, the jury returned its verdict convicting the appellants under counts three through eight. It acquitted them on two other counts. Note 1 *supra*. The court then questioned each juror, under oath and out of the presence of other jurors, concerning his or her knowledge of the information related to Hicks. No juror, except the foreman, Davis, had such knowledge. Like Hicks and Rose, Davis had no other information. He further testified that he had not ascribed any significance to the information or linked the information to trial. The court concluded that the information was innocuous and without prejudice to the defendants beyond a reasonable doubt.

[6] The court's actions in investigating the claims on which the mistrial motion was based accorded with its "ever-present duty to ascertain whether a jury has been affected by events occurring outside of the trial." *United States v. Martinez*, 604 F.2d 361, 364-65 (5th Cir. 1979). The trial court's procedure of separately questioning the alternate jurors and then, later, the serving jurors, accorded with that approved in *Martinez* and in *Remmer v. United States*, 347 U.S. 227, 229-30, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954). The trial court's conclusions were not clearly erroneous.

AFFIRMED.

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